In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1939

No. 460.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

THE FALK CORPORATION.

BRIEF OF

Independent Union of Falk Employees, Intervener

In Opposition to Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

FRANK P. BURKE,
GILES F. CLARK,
Attorneys for Independent Union of Falk Employees, Intervener.

GILES F. CLARK,
Of Counsel.

INDEX.

CITATIONS.

Cases:

Statutes:

In The

SUPREME COURT OF THE UNITED STATES

No. 460.

OCTOBER TERM—1939

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

THE FALK CORPORATION.

BRIEF OF

Independent Union of Falk Employees, Intervener

In Opposition to Petition for a Writ of Certiorari to the United States Circuit Court of of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The first opinion of the Circuit Court of Appeals (R. 1198) is reported in 102 Fed. (2) 383. The second opinion (R. 1208) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1165-1180) are reported in 6 N. L. R. B. 654.

ARGUMENT.

The Petitioner gives as a reason for granting the Writ of Certiorari in this matter, the fact that the Court below "declined to grant full enforcement of the Board's disestablishment Order." The word is "establishment" in the Petition, but we assume this is a typographical error.

Petitioner takes it for granted that the Court declined to grant the Board's Order disestablishing the Independent Union. We do not agree with the Board in this contention. The Order of the Board specifically referring to the disestablishment is as follows (R. 1180):

> "2 (b) Immediately post notices in conspicuous places throughout its Milwaukee plant and maintain such notices for a period of thirty (30) consecutive days stating (1) that the respondent will cease and desist in the manner aforesaid, and (2) that it has withdrawn all recognition from the Independent Union of Falk Employees as the representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and that it has completely disestablished said organization as such representative;"

The Order of the Court, having to do with disestablishment, is as follows (R. 1211):

> "It is further ordered that the respondent shall post notices in conspicuous places throughout its Milwaukee plant and maintain such notices for a period of thirty consecutive days stating that the respondent will and does withdraw recognition of the Independent Union of Falk Employees as representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages or rates of pay, hours of employment, and other conditions of employment, and that it has, and

does, completely disestablish such labor organization as such representative, and that it will not recognize it until and unless its said employees freely and of their own choice select the Independent Union as their representative to so deal with said respondent concerning said labor disputes."

True, the Court adds to the Order of the Board in this respect the provision that the Company

> "will not recognize it until and unless its said employees freely and of their own choice select the Independent Union as their representative to so deal with said respondent concerning said labor disputes."

This addition, however, can hardly be urged by the Board as a refusal on the part of the Court to grant full enforcement of the Board's disestablishment order.

The Court did not agree with the Board that the Order of disestablishment should be so drastic as to preclude the Independent Union from appearing on the ballot at a future election.

There is strong argument in favor of the Decree of the Court in the language of the Board in its Decision, under the heading, "The Remedy" (R. 1179), where we find this statement:

> "We shall direct that such election be held upon our further order after we are satisfied that the effects of the respondent's unfair labor practices have been dissipated by compliance with this order."

If the election is to be held after the Board is "satisfied that the effects of the respondent's unfair labor practices have been dissipated," what possible harm can result in the Independent Union appearing on the ballot?

The Court, then, only modified that part of the Board's decision dealing with the situation after the Independent has been disestablished as the bargaining agent under conditions as the Board found them at the hearing.

A careful reading of the Court's second opinion (R. 1209) does not indicate that the Court was passing upon the "coming election." The Court said (R. 1209):

> "We are, however, not merely passing on the terms of a contemplated or coming election. We have much broader and comprehensive issues to deal with. We are disposing of a labor dispute case wherein the proceedings have gone beyond mere plans by the Board for the calling of an election. We are, upon the Board's petition, disposing of a labor dispute which involved alleged interference on the part of the employer with the selection of the bargaining agent by the employees."

We fail to follow the logic of the Petitioner that the Decree of the Court leaves no doubt that the Board's Direction of Election is reviewed and modified having in mind the Board's Decision (R. 1166), Order (R. 1180) and Direction of Election (R. 1181).

We find that the Direction of Election does not specifically and by direct language preclude the Independent from appearing on the ballot, in any election spoken of in said Direction of Election.

The Board, as part of its Decision, designated as "The Remedy" (R. 1179), did provide:

> "We shall, therefore, order an election to be held among the employees of the respondent, who were in its employ during the pay-roll period immediately preceding our Direction of Election in order to determine the appropriate bargaining unit or units and the representation of employees within such unit or units. We shall direct that such election be held

upon our further order after we are satisfied that the effects of the respondent's unfair labor practices have been dissipated by compliance with this order. In such election we shall make no provision for the designation of the Independent on the ballot."

This was, however, in connection with the unfair labor practice hearing.

The lower Court by indicating that the name of the Independent should appear on the ballot in a future election, when ordered by the Board, merely held that the Board was in error when, in connection with its order of disestablishment, it ordered that the Independent should not appear on the ballot.

The Court, having jurisdiction of the question pertaining to the disestablishment order, as a part of the affirmative action ordered by the Board, in connection with the unfair labor practice hearing, had the right to modify that portion of the Order directing that the Independent was to be precluded from appearing on the ballot. In short, the Board's order that the Independent not appear on the ballot at a future election was not made in connection with its Direction of Election, but was made in connection with the unfair labor practice ruling.

Petitioner fails to distinguish between the order issued by the Board resulting from its Findings on the hearing as to unfair labor practice, and the Direction of Election issued as a result of its Finding on the question of representation. Both hearings were consolidated for the purpose of the hearing (Board's Exhibit 2).

The Petition herein, at page 8, refers to the Direction of the Board (R. 1178, 1181 and 1182), as a part of the investigation to ascertain representatives for collective bargaining. We contend and the lower Court apparently so viewed it, that the Direction of the Board (R. 1178) as to

the Independent not appearing on the ballot dealt with the unfair labor practice hearing, and the Direction of Election dealt with the representation hearing.

The Court, therefore, in its Decree, did not modify the Direction of Election, but did modify the Order issued in the unfair labor practice hearing. The Court was entirely within its jurisdiction in so doing.

Section 9 (d), *National Labor Relations Act.*

If the Decree of the Court be construed as modifying the Direction of Election, as provided by the Board, we respectfully urge that the National Labor Relations Act, Section 9 (d), gives to the Court the right so to do.

In this case the Board had consolidated the representation hearing with the hearing on the unfair labor practices, as provided by Section 9 (c) (Board's Exhibit 2); the testimony was taken pursuant to Section 10 (c), and the Order, made pursuant to Section 10 (c), was based, in part at least, upon facts certified following the investigation pursuant to Section 9 (c). There was, then, the Petition for the enforcement or review of such Order, and by the terms of Section 9 (d), a certification and the Record of such investigation were included in the transcript of the entire Record.

> "The Decree of the Court enforcing, modifying, or setting aside, in whole or in part, the Order of the Board, shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript" (Section 9 (d)).

So we urge that the Court, under the circumstances, if it did change the Order of Direction of Election, was within its jurisdiction in so doing.

The question as to whether the Act confers jurisdiction upon the Circuit Court of Appeals to review the Direction of Election standing alone, is now before the Court, in *National Labor Relations Board vs. International Brother-*

hood of Electrical Workers, 105 Fed. (2) 598 (C. C. A. 6), Certiorari granted, October 9, 1939, No. 253 this Term.

And, the question of the jurisdiction of the Circuit Court of Appeals to review a certification issued by the Board, is before this Court in the case of *American Federation of Labor vs. National Labor Relations Board,* 103 Fed. (2) 933, Certiorari granted, October 9, 1939, No. 70 this Term, as appears in the Petition herein. Of what assistance will a review in this case be?

The question of the jurisdiction of the Circuit Court of Appeals to review the Direction of Election, according to the Act, is provided in Section 9 (d) of the Act. The Court will have, in the two cases now pending before it, and cited above, the question as to when the Circuit Court of Appeals has jurisdiction to review a Direction of Election, and when the Circuit Court of Appeals has jurisdiction to review a Certification.

Petitioner argues that the Board could not have sought enforcement of its Direction of Election in the Court below since such Direction did not purport to require respondent, or any other person, than the Board's Regional Director, to take or refrain from taking any action.

If, as the Petitioner argues, the language appearing in that part of the Board's Decision, called "The Remedy" (R. 1179), was part of the Direction of Election, we call the Court's attention to the terms of that Direction of Election, wherein it precludes the Intervener, Independent Union, from appearing on the ballot, and the fact that the Board provided (R. 1179):

> "In such election we shall make no provision for the designation of the Independent on the ballot."

Surely, this was an order restraining one of the parties to the hearing from exercising a right, and denying to the

members of the Independent Union, including some eight hundred (800) men (R. 1178), who had designated this organization as its bargaining agent, the fundamental right guaranteed by the National Labor Relations Act to freely choose their own representative for the purpose of collective bargaining.

National Labor Relations Act, Section 7.

The Intervener, Independent Union, was not made a party by the Board, in its Petition to the Court for an order enforcing the Board's Order. The Court below granted the Petition of the Intervener, Independent Union.

The Petition of the Intervener, among other things, set forth the following facts (R. 1196):

> "That it is necessary that the Independent Union of Falk Employees be permitted to intervene, to assure a full and complete hearing of said petition filed by the Board, and for the further reason that the National Labor Relations Board seeks to deny to the members of said Independent Union of Falk Employees rights guaranteed to them by the National Labor Relations Act."

Surely, the petition of the Intervener (R. 1194, 1195, 1196 and 1197) widened the scope of the review to include the Order of the Board precluding the Intervener from appearing on the ballot.

The Decision of the Court below is not in conflict with the case of *National Labor Relations Board vs. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, or *National Labor Relations Board vs. Pacific Greyhound Lines, Inc.*, 303 U. S. 272.

In *National Labor Relations Board vs. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, this Court, at page 262, said:

> "The main question for decision is whether, upon a finding that an employer has created and fostered

a labor organization of employees and dominated its administration in violation of Sec. 8 (1), (2) of the National Labor Relations Act of July 5, 1935 (Chap. 372, 49 Stat. at L. 449, 29 U. S. C. A. Sec. 151 et seq.), the National Labor Relations Board, in addition to ordering the employer to cease these practices, can require him to withdraw all recognition of the organization as the representative of its employees and to post notices informing them of such withdrawal."

And, at page 263, this Court said:

"The Board ordered that respondents cease each of the specified unfair labor practices. It further ordered that they withdraw recognition from the Employees Association as employee representative authorized to deal with respondents concerning grievances, terms of employment, and labor disputes, and that they post conspicuous notices in all the places of business where such employees are engaged, stating that the 'Association is so disestablished from that respondents will refrain from any such recognition thereof' 1 N. L. R. B. 1."

The lower Court in that case struck from the order all provisions requiring the withdrawal by respondents of recognition of the Employees Association and publication of notice of withdrawal.

The lower Court was of the opinion that the Board was without authority to order the employers to withhold recognition from the Association, without notice to it and opportunity for a hearing, and without an election by the employees to choose a labor organization to represent them.

This Court, at page 271, stated:

"There was ample basis for its conclusion that withdrawal of recognition of the Association by respondents, accompanied by suitable publicity, was an appropriate way to give effect to the policy of the Act."

We call the Court's attention to the Decree of the lower Court in the instant case, wherein almost the same provisions are made (R. 1211).

In *National Labor Relations Board vs. Pacific Greyhound Lines, Inc.*, 303 U. S. 272, this Court, at page 273, stated:

> "The only question requiring separate consideration is whether, in a case in which the National Labor Relations Board has ordered respondent to cease certain unfair labor practices, including the domination and financial support of a company union, these facts justify its further order that respondent withdraw all recognition of the union and give appropriate notice of the withdrawal to employees."

The question of the right of the Board to order an employer to cease the continued recognition of an agency found to have been dominated or supported by it was the one decided in this case.

Both these *Greyhound* cases are vastly different from the situation in the instant case.

The lower Court, in this case, actually ordered the employer to cease and desist from the practice complained of, to withdraw all recognition of the Independent Union as the representative of all or any of its employees, and to post notices to that effect (R. 1211).

The lower Court here granted all the relief sought in the *Greyhound* cases, but provided that in any election to be held in the future the employee should be free to choose any bargaining agent that he desires, including the Independent Union. All, we think, in conformity with the statement of policy as found in *National Labor Relations Act*, Section 1.

We concede that the Board has the power to order such affirmative action as will effectuate the purposes of the Act, but, as stated by this Court, in *National Labor Relations Board vs. Fansteel Metallurgical Corp.*, 306 U. S. 240:

> "The authority to require affirmative action to 'effectuate the policies' of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes."

The lower Court here did not substitute its judgment for that of the Board, as to the appropriate remedy. It held the Board to be in error in attempting to preclude the Independent from appearing on the ballot at a future election, and the Court clearly had that right under the Act, Section 9 (d), and under the Decisions of this Court.

CONCLUSION.

We respectfully submit that the Petition for a Writ of Certiorari herein should be denied.

FRANK P. BURKE,
GILES F. CLARK,
Attorneys for Independent Union of Falk Employees, Intervener.

GILES F. CLARK,
Of Counsel.

APPENDIX.

The pertinent provisions of the *National Labor Relations Act* (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 158 et seq.) are as follows:

FINDINGS AND POLICY.

"Section 1. • • •

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

"Section 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

• • • • • • •

"Section 9. • • •

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or

selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

"Section 10. • • •

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person and order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. • • •

• • • • • • •

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor

practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." • • •